

IN THE HIGH COURT OF JUDICATURE AT MUMBAI  
CIVIL APPELLATE JURISDICTION  
WRIT PETITION NO.92 OF 2016

|                            |     |            |
|----------------------------|-----|------------|
| Jayant Dharshi Shah        | ... | Petitioner |
| Vs.                        |     |            |
| Sushilaben Zaverchand Shah | ... | Respondent |

Mr. Chetan Yadav for Petitioner.  
Mr. Sham Walve for Respondent.

**CORAM : R. G. KETKAR, J.**  
**DATE : JANUARY 06, 2016**

**P.C. :**

Heard Mr. Yadav, learned Counsel for petitioner and Mr. Walve, learned Counsel for respondent at length.

2. By this Petition under Article 227 of the Constitution of India, original defendant has challenged clause (c) of the operative part of the order dated 26.11.2015 passed by the learned Judge, City Civil Court, Mumbai in Chamber Summons No.2105 of 2015 in Execution Application No.2105 of 2015 in Execution Application No.178 of 2013 in High Court Suit No.1828 of 2006. By that order, the learned trial Judge partly allowed the Chamber Summons taken out by the petitioner, hereinafter referred to as the defendant and permitted him to participate in the auction sale of the suit property. By clause (c) of the operative part of the order, the learned trial Judge held that if the defendant is selected as the highest bidder in the auction sale, in that event, he shall deposit 100% amount of that auction sale. The Court Commissioner was also directed to follow the directions issued in Chamber Summons No.1464 of 2010 dated 17.12.2014 while distributing the amount of auction sale in between the plaintiff and the defendant.

3. Mr. Yadav submitted that admittedly, plaintiff and defendant have half share each in the suit property. Respondent, hereinafter referred to as plaintiff, has instituted a Suit for partition. The Suit is between the sister-in-law and the brother-in-law. The parties admit that they have 50% share in the suit property. The suit property is the land and structure standing thereon including the tenanted building as more particularly described in the plaint. He submitted that the suit property was proposed to be sold in the auction through the Court Commissioner of this Court. Defendant therefore, took out Chamber Summons under Order 21, Rule 72 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') seeking permission to him or any person claiming through him to participate and bid in the auction sale. Defendant further prayed that in the event he is declared as the highest bidder in the auction sale, he may be permitted to deposit 50% amount of the final bid (as plaintiffs have  $\frac{1}{2}$  share).

4. As against this, Mr. Walve submitted that plaintiff took out Chamber Summons No.1464 of 2010 for appointing Court Commissioner for taking accounts of the suit property and selling the suit property by public auction and after deducting costs, charges and expenses to divide the sale proceeds equally between plaintiff and defendant. By order dated 17.12.2014, the learned trial Judge allowed the Chamber Summons. Among various directions, the learned trial Judge directed the Court Commissioner to pay the amount of plaintiff from the share of the defendant as the defendant did not pay the amount received by himself and on behalf of the plaintiff towards transfer of tenancies. He submitted that the said order was confirmed by this Court on 03.03.2015 in Writ Petition No.1518 of 2015. He further submitted that in fact while passing order on 12.06.2009, defendant agreed that he will give credit to the plaintiff at the time of distribution of the parties  $\frac{1}{2}$

share to the extent of the amount received upon the tenancies already transferred by him without the consent of the plaintiff. Mr. Yadav submitted that clause 7 of the order dated 12.06.2009 is complied. Mr. Walve disputed this position and submitted that this is subject to taking of accounts.

5. By the impugned order, the learned trial Judge held that in case the defendant is selected as the highest bidder in the auction sale, he shall deposit 100% amount of that auction sale. In paragraph 11, the learned trial Judge observed that if the prayer of defendant is accepted, it will be contrary to the directions dated 17.12.2014 issued while disposing of Chamber Summons No.1464 of 2010. The said directions would be frustrated if the request made by the defendant is acceded to. In paragraph 12, the learned trial Judge further observed that if the defendant is permitted to deposit 50% amount of auction sale namely, to the extent of share of the plaintiff, as far as the amount received by him for himself and on behalf of the plaintiff, in that event, plaintiff will have to initiate separate proceedings. That apart, in my view, unless and until, the entire amount of auction sale is deposited by the successful bidder, the auction sale cannot be confirmed. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

**(R. G. KETKAR, J.)**

*Minal Parab*